UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT TACOMA

STATE OF WASHINGTON, Plaintiff, v. FRANCISCAN HEALTH SYSTEM d/b/a CHI FRANCISCAN HEALTH; FRANCISCAN MEDICAL GROUP, THE DOCTORS CLINIC, a professional corporation; and WESTSOUND ORTHOPAEDICS, P.S., Defendants.	3:17-cv-05690-BHS Tacoma, Washington March 5, 2019 Pretrial Conference

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VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE BENJAMIN H. SETTLE
UNITED STATES DISTRICT JUDGE

For the Plaintiff:	RENE TOMISSER JONATHAN MARK ERICA KOSCHER AMY HANSON Assistant Attorneys General
For the Defendant Franciscan Health System:	HERBERT ALLEN MATTHEW HANS MITCHELL RAUP JESSICA ANDRADE Attorneys at Law
For the Defendant The Doctors Clinic:	DOUGLAS ROSS DAVID MAAS Attorneys at Law

Proceedings stenographically reported and transcribed with computer-aided technology

MORNING SESSION

MARCH 5, 2019

THE CLERK: This is the matter of State of Washington versus Franciscan Health System, Cause Number CV17-5690-BHS. Counsel, please make an appearance.

MR. TOMISSER: Rene Tomisser for the State of Washington, Office of Attorney General.

MR. MARK: Jonathan Mark also with the Attorney General's Office.

MS. KOSCHER: Erica Koscher with the Attorney General's Office, State of Washington.

MS. HANSON: Amy Hanson with the Attorney General's Office for the State of Washington.

MR. ROSS: Good morning. Douglas Ross for The Doctors Clinic.

MR. RAUP: Mitchell Raup with Polsinelli for Franciscan Health System and WestSound Orthopaedics.

MR. HANS: Matthew Hans with Polsinelli also for Franciscan Health and WestSound Orthopaedics.

MR. ALLEN: Herbert Allen for Franciscan defendants also with Polsinelli.

THE COURT: Good morning, everyone. They are having in chambers an over/under as to how many lawyers would be in the courtroom. I lost.

The bench trial, as we know, is to begin in two weeks.

The issues have been somewhat narrowed by the Court. Have the parties conferred and determined what now your best estimate is as to the length of the trial?

MR. TOMISSER: I don't know that we have conferred about that specifically. We have taken into account the Court's ruling from last Friday and have cut down the number of witnesses, deposition excerpts and things like that to estimate how much time might be saved by going forward in that posture.

MR. ROSS: Your Honor, from defendant's point of view, it seems as though there may be a logical way to bifurcate the trial from the ruling the Court issued on Friday. The Court indicated the question of whether or not Franciscan and The Doctors Clinic are a single entity is dispositive of the Section 1 issue. It may make sense for us to try that issue. That would greatly narrow the number of witnesses, exhibits, deposition excerpts and the like, after which, if the Court rules it is a single entity, trial is over. If the Court rules it isn't, we proceed. And the argument would be in the next phase is it per se, is it rule of reason and what is the evidence. That is a suggestion that seemed to come from the Judge's ruling.

I also recall way back at the beginning of the case when the State first moved for summary judgment, a motion the Court denied, the State indicated the question of whether or

not the two are a single entity for antitrust purposes is potentially a dispositive issue. It may be a logical way to shorten the length of the trial.

THE COURT: You are right. The Court is exploring that, given particularly the fact that we only have four days before the Court has a criminal trial that is going to consume the following week. I think the other two criminal trials are not going to interfere with that. We do have the one criminal trial.

I do think it is conceivable that the Court could be able to consider the one discrete question. It might not be able to fully have that issue presented within that four days. Do you think four days is doable for the discrete issue of whether it is a single entity, joint venture, so forth?

MR. TOMISSER: That is probably not quite enough time. I can inform the Court, the State agrees bifurcation on those grounds is a good idea. We would be supportive of that. We think there is a substantial amount of overlap between the single entity rule issue and the per se rule, that it may make some sense to do those two issues at the same time and get decisions on those before we get into rule of reason.

Some of the other considerations, if we have to get into the rule of reason, as Your Honor is aware, we have a lot of information in this case produced by the third-party payers,

confidential information. There is going to be a lot of back and forth with confidential presentations that would be saved. I think it is a good idea to bifurcate.

We would like the Court to consider the rule of reason and the per se as the two threshold issues. Four days, even though there is a lot of overlap between those two issues, I am not sure four days is quite enough.

THE COURT: That seems to be a reasonable thought there.

What do you say, Mr. Ross, about that, about concluding the per se?

MR. ROSS: If what we are talking about is deciding what the rule of application is, what we had proposed is first we decide whether it is a single entity, that would be the threshold issue. The second issue is whether or not to apply the rule of reason or the per se rule without getting into the how the rule is going to be applied should the Court decide it is the rule of reason.

I think it is neater if we just do that first issue first. We can then proceed to the trial and put in all the evidence, and the Court can decide if it is rule of reason or per se. There will be evidence that would come in to argue that the rule of reason should apply, that won't come in on the single entity issue. There will be discussions of whether efficiencies are produced, for example, that would go to

whether the rule of reason should apply in the event we are not a single entity. So there may be additional evidence that would have to come in. It could be shorter and quicker if the Court did that first issue alone.

THE COURT: Given we have only four days and the benefit of then having a hiatus for the Court to consider that issue, although I might say that if it ends up being a close question on the single entity, the Court may wish to not render a decision on that and proceed to take the rest of the case on the per se and rule of reason in order to have a decision that if either or both parties seek to review it at the circuit, that the case can be resolved sooner completely. That is in my mind.

If I think that it is a close question, I may defer on it just so the whole of the record can be developed in this case. The parties have worked hard. I don't want to see -- if the Court were to find for the defendants on the single entity, I wouldn't want to see all this go up to the circuit and have the circuit disagree with me and then we have to litigate. That is my thinking, at least at this point, on that. I do think we can benefit from separating the issues.

I will talk more about the confidentiality order after a bit here.

I have reviewed the parties' motions to exclude the experts. I am going to address those now.

The plaintiff moved to exclude the reports and testimony of three of the defendants' experts. Defendants have moved to exclude testimony or portions of testimony of four of the plaintiff's. Generally, reports themselves are not admitted, of course, as evidence unless excerpts are used for impeachment purposes.

Before addressing individual motions, I will make some general comments here.

This case, as we all know, presents some very substantial and complex questions of fact and law. As a preliminary matter, because this will be a bench trial, it will have some influence on how the Court will proceed on the matters of initially qualifying experts and ultimately on its rulings regarding the scope or limits of a particular expert's testimony.

The Court recognizes that *Daubert* and Rule 702 still apply in a bench trial. The Court will require that any witness who is presented for testimony by a party will first be vetted for their qualifications in the relevant field to which his testimony is expected and whether his methods and applied principles are reliable.

Secondly, assuming a witness qualifies, the Court will take up objections as to specific areas of testimony. This procedure will occur while the trial is in progress and therefore the Court will not need separate *Daubert* hearings

in advance of trial.

Much of what both parties regard in their motions as disqualifiers of particular witnesses goes to the reliability of the methods used in the development of data and reports. These disqualifier concerns would typically be raised by objections during trial testimony. In most cases, the Court will likely overrule the objection and take testimony with the concerns being addressed through vigorous cross-examination.

Another common theme in the parties' motion is the concern that a witness should not be allowed to usurp the role of trier of fact which, of course, in this case is the Court, nor allow a witness to express an opinion on a question of law. Both parties have cited to prior rulings of the Court concerning these issues.

With regard to the latter, the parties understand that the Court will not admit testimony on a question of law. Even so, the Court will expect to hear from the experts in their field giving testimony regarding the legal framework and principles that govern the issues for which their opinions were developed. Then experts will refer and discuss facts that are relevant to a particular legal principle or framework. In many ways, the Court regards expert testimony, especially in a bench trial, as something like a tutorial really, one that is tested by cross-examination through the

testimony of experts of opposing opinions.

Although the Court will not now exclude or limit testimony of any identified expert of either party for the reasons I have already stated, I will make some observations and comments about each such proposed expert. I begin with the defendants' experts that plaintiff has moved to exclude in whole or part.

Dr. Lawrence Wu. Plaintiff moved to exclude portions of testimony of Dr. Lawrence Wu on six subjects. First, plaintiff objects to the methods and means Dr. Wu employed to gather data and form his opinions. The fact that these interviews were both conducted in the context of ongoing litigation and ex parte renders the results as being less reliable than these interviews would have been had they been conducted before the transaction was entered into. Nonetheless, the Court will likely admit Dr. Wu's testimony concerning the content of these interviews, but the Court will be more interested in the live testimony of physicians and less weight will be given to the statements made during the less formal and less reliable interview environment.

While the plaintiff makes a valid argument that, contrary to the defendants' assertion, it was not reasonable to take the depositions of 54 physicians, plaintiffs could have taken a few to test the interview method and results. In any event, before hearing these results, the Court will have to

hear more about the manner and method of seeking answers in such a manner that the answers are not suggestive of the question or are otherwise designed to obtain the desired answer.

Secondly, plaintiff contends that Dr. Wu did not use the two-stage method in analyzing competition among healthcare providers. While this is a recognized and accepted method, the parties' experts appear to disagree as to its application to the facts in this case. The Court is unable to assess the disagreement without more, which will be better determined at trial with the explanation of Dr. Wu's view of Kaiser's presence in the marketplace, and to what extent it represents a competitor for payers and patients.

Thirdly, plaintiff asserts Dr. Wu's opinion that prospective patients in Kitsap Peninsula and Bainbridge Island in significant numbers is not supported by reliable data to which defendants respond that it is an undisputed fact that two-thirds of these orthopedic patients travel from Seattle to Tacoma for care and cite to Dr. Wu opining that one possible reason is the perceived quality of physician services is higher in Seattle.

The Court will look closely at the method and data collection process Dr. Wu used or relied upon before this evidence will be considered.

Similarly, plaintiff challenges Dr. Wu's basis for his

opinions regarding the expansion of the delivery of healthcare services by increasing Franciscan's referral base. Similarly, defendants here fail to provide the details of the data and methods upon which defendants base this opinion or whether the opinion is based upon experience of other systems in similar markets. Dr. Wu's opinion on this subject will also be closely scrutinized.

Next, plaintiff objects to Dr. Wu expressing a legal principle that healthcare firms with less than 30 percent market share warrant no deeper inquiry. This appears to be a legal principle the Court does not need assistance from an expert to apply if accurate and appropriate to this case. What may be relevant to this end is whether this exists in the case data reflecting the market share of the pertinent healthcare providers in the KP/BI, which is what we all understand are the initials for the Kitsap Peninsula and Bainbridge Island area.

Finally, plaintiff seeks to exclude any opinion of Dr. Wu that relies on excluded testimony of Mr. Henske or Mr. Kennedy. The outcome of this motion will have to await the circumstances upon which it may arise during trial and as more thoroughly discussed in connection with motions to exclude testimony of Mr. Kennedy and Mr. Henske.

With regard to Kevin M. Kennedy, plaintiff has moved to exclude that report and opinion. The Court has already

indicated in its summary judgment motion it was not considering his single entity conclusion. While the Court renders that limitation in connection with an ultimate question of law that the Court will have to decide, the Court, by that ruling, did not preclude hearing any testimony at all. Instead, if the defendants call him to testify, they will have to qualify him as an expert in the matters about which he is expected to testify.

In making the decision of whether the TDC and the Franciscan group are a single entity for the purpose of analysis of whether the Sherman Act applies, it may be Mr. Kennedy will be able to assist the Court in understanding forms of physician/hospital relationships in the market and their respective characteristics as well as the factual characteristics of the Franciscan/TDC relationship.

Similarly, before he can render an opinion regarding gained efficiencies in the delivery of healthcare obtained through the implementation of the transaction between the TDC and Franciscan, a foundation will have to be established that his background, experience and training, as well as his gathering of facts and data in the KP/BI market, can qualify him to offer such an opinion.

Additionally, whether the framework Mr. Kennedy utilized to examine the degree of integration of healthcare firms is one accepted in the healthcare industry or is otherwise

reliable is a matter left for determination when and if Mr. Kennedy is presented on this subject.

With regard to whether Statement 8 is relevant or useful, the Court will have to determine after hearing any expert qualified by either party as to the applicability of that provision in evaluating the issue of "efficiency-enhancing integration." Whether Mr. Kennedy's analysis of, and opinion about, the Franciscan/TDC transaction will be accepted testimony must again wait until and unless a foundation is laid and the Court hears from the parties as to the factual basis for and the reliability of the opinions offered through Mr. Kennedy. For similar reasons, the Court defers ruling on the question of whether he will be permitted to give testimony on improved quality in the delivery of healthcare after the agreement was implemented.

Plaintiff moved to exclude the entire testimony of Leonard Henske. The Court previously granted summary judgment to plaintiff that precludes TDC's affirmative defense to the alleged Sherman Act of failing firm. Yet, the defendants assert the need to still produce testimony through Mr. Henske that under the rule of reason analysis that focuses on the net effect of merger on the relevant market, the two defendant entities were weakened competitors. The plaintiff asserts that his testimony is unreliable because he uses his own framework for determining the strength and

viability of the firms if the transaction had not been entered into. While plaintiff appears to have accurately pointed out Mr. Henske did not apply the standard framework for failing companies of the Horizontal Merger Guidelines, he does purport to use a framework that has unique application to physician-owned medical practices. The Court is unable to conclude upon the submissions as to whether his framework is accepted and reliable. It is certainly possible that in the right set of facts the Court can find a healthcare practice owned by the providers can be failing even though its assets exceed liabilities if with a reasonable degree of certainty the practice would, over some predictable and obviously short period of time, lose its physicians to firms outside the physician's current market. Yet there are a lot of evidentiary hurdles that would have to be overcome before such an opinion would be heard, let alone accepted.

As to methods of data gathering as to physician interviews, this issue has already been discussed and addressed in the discussion of Dr. Wu's expert testimony. The Court is not now prepared to reject Mr. Henske or his opinions.

Moving to defendant's motion to exclude. The first concerns Dr. J. Gregory Eastman. Defendants move to exclude his testimony asserting he lacks qualifications to opine on the economics of the TDC and WSO because he had no

specialized knowledge of the operators healthcare providers or how they compensate their physicians and he has no knowledge about the Kitsap region and market dynamics in that region of physician and healthcare systems. In particular, defendants allege he has never before considered the financial viability of a physician's group, let alone a primary care group or group of orthopedists. It is further argued that he is not familiar with the Kitsap market as to opine as to alternatives to the transactions that are the subject of this litigation.

Defendants also allege that he lacks qualifications to express an opinion about the likelihood that physicians would leave the market and that he relies on other expert data and express legal conclusions. Plaintiff responds to all this that Dr. Eastman has exemplary credentials in the field of antitrust and, as argued by defendants in response to plaintiff's motions to exclude, most of the defendants' objections are matters for cross-examination.

It is conceivable the plaintiff will not be able to qualify Dr. Eastman as an expert in the financial field of the delivery of primary and orthopedic healthcare in the relevant market, but the Court is unable to make a determination without plaintiff laying a more thorough foundation for his opinions. The Court, of course, will not, as previously stated, receive legal conclusions from this or

any other witness. However, at least some of his proposed opinions are better characterized as factual opinions.

With regard to Dr. Cory Capps, which defendants move to exclude, essentially there are two bases for the motion. Defense contends that Dr. Capps' analysis is unreliable because he did not properly consider an alternate theory to explain the pricing increase in primary and orthopedic care in the Kitsap region. Specifically, he did not account for the effects of vertical integration and relied on horizontal overlap only. Plaintiff asserts that Dr. Capps, in his co-authored study finding that vertical integration increases healthcare pricing, included controls for any effects caused by an increase in the horizontal concentration of physicians.

Plaintiff further asserts the effects of vertical integration on pricing is in addition to the result of decreased horizontal competition. In short, Dr. Capps concluded that horizontal elimination of competition and not vertical integration was the most substantial cause of the price increases.

The defense, in response, says if both phenomenon are present, then Dr. Capps is engaging in speculation as to what amount is attributable to the decrease in horizontal competition.

If I understand the plaintiff's position, the entire increase is attributable to the alleged illegal transactions,

because had the transaction not been entered into in the first place, none of the increases would have occurred.

The second basis is Dr. Capps is alleged to lack an understanding of the Washington Network Adequacy Regulations as they relate to identifying markets for scrutiny on the issue of the presence of competition.

Defense argues that because of his lack of familiarity, he has defined the relevant market too narrowly. Yet plaintiff contends he did not rely on these regulations, but on the well-accepted hypothetical monopolists/SSNIP test.

Once again, these are issues to be sorted out during trial. At this time, the Court cannot rule that the methods used in the analysis are fatally flawed and a determination of whether some or all of Dr. Capps' testimony should be disregarded will have to be deferred until then.

Moving to Dr. Lawton R. Burns, the motion to exclude his testimony. Dr. Burns is presented as an expert in healthcare integration and is familiar with the application of Statement 8 as used by the Department of Justice in enforcing antitrust laws in the healthcare industry. He will, if permitted to testify, opine as to how the transactions here do not result in clinical or economic integration.

While the Court will not receive testimony from any witness as to legal conclusions as to whether the relationship between TDC and FMG is or is not one of

principal-agent or that the resulting relationship constitutes for antitrust purposes a single entity, the Court must again, however, defer ruling on what testimony the Court will hear from Dr. Burns in explaining how enforcement agencies conduct their analyses on these subjects. It is likely that the Court will permit testimony concerning his review of the discovery in this case and to what extent he found evidence or lack thereof. For example, physician report cards, clinic performance criteria, physician training, among others. Of course, the defense will have an opportunity to elicit through cross-examination and other witnesses the presence of such evidence. This is the type of expert testimony that might be helpful to the trier of fact.

Once again, because this is a bench trial, the Court may give a little more latitude in taking testimony from acknowledged experts in their field to outline applicable and accepted frameworks when analyzing business relationships in the field of healthcare. An expert in giving testimony that provides analysis in a trial is to refrain from offering opinions on what the ultimate legal conclusions the Court should draw. Even so, it needs to be recognized that experts in the antitrust regulatory and enforcement field are in many ways virtually an extension of the lawyers for a particular side assisting the Court in establishing the proper, if not sometimes competing, legal frameworks for analyzing the

issues that are before the Court.

Dr. Daniel Kessler. Defendants again are moving to exclude his testimony on two primary bases. First, defendant asserts that plaintiff is attempting to insert a new unapplied legal theory of establishing an antitrust violation, that is the competition was weakened through vertical integration.

Plaintiff responds that the transactions' anticompetitive effects of the horizontal agreements included the intertwining of the vertical relationship centered on the CHI Franciscan's ownership of Harrison Medical Center. It is unclear to what extent this relationship and evidence of effects on the hospitals after the transaction had on the weakening of competition and pricing.

I am interested in what opportunities the defendants did have to rebut this opinion, which it asserts was first revealed in the Kessler report.

MR. ROSS: That was the first assertion of it, Your Honor, from the beginning of the plaintiff's claim in the case, was that the horizontal aggregation of adult primary care physicians at TDC and Franciscan Medical Group was anticompetitive and that the horizontal aggregation of orthopedic physicians at TDC and the Franciscan Medical Group and WSO was anticompetitive. Those are horizontal claims.

The government, federal government, in all of its mergers

has only brought horizontal claims. A case I think many of us look to for some analogies to this case is the *St. Luke's* case in Boise. It was brought by the federal government purely as a horizontal case. The plaintiff in that case, St. Alphonsus, the other rival system in town, did bring an explicitly vertical case, which the court chose not to take up at trial. It was explicitly acknowledged, and the markets affected, which were hospital markets, not physician markets, were explicitly identified by the plaintiff, St. Alphonsus, in that case. We had no similar identification of a vertical theory in this complaint, in any of the motions, at any time until we took Dr. Kessler's deposition, which was literally at the end of discovery.

MR. TOMISSER: From plaintiff's side of this, as counsel acknowledged, they did have Dr. Kessler's report, all the underlying data and the opportunity for seven hours of deposition, which they took advantage of and which explained the basis of the opinion.

The State here has alleged certainly horizontal restraints of trade. It is not as simple as simply two separate horizontal players in the market. The effect of that horizontal relationship is necessarily intertwined with FMG's -- Franciscan Medical Group's relationship with Franciscan Health System and Harrison Hospital, and the relationships that are required then to impact that

transaction with TDC in terms of whether referrals go, requirements for what TDC gave up in that transaction simply can't be separated without that understanding that there was, in fact, an impact with Harrison Medical Center through FMG in this transaction. It is impossible to really understand how this transaction happened in terms of what were the benefits of the arguments for the two parties without considering that impact with the hospital in this case.

THE COURT: I am primarily concerned about the prejudice here. Of course, his deposition was to be taken. The plaintiff's argument here is that these are effects, this is not an independent theory of liability. So I am curious as to -- this was not anticipated until you saw the Kessler report, but do you have among your experts someone who can deal with and address the issue?

MR. ROSS: Your Honor, on the question of whether it is an independent basis of liability, the claim in the case is that the transaction between FMG and The Doctors Clinic had an anticompetitive effect in two markets, two physician markets: adult primary care and orthopedics. That is it.

Mr. Tomisser is now talking about effects in the hospital market where Harrison Medical Center competes with hospitals in Tacoma and Seattle. That is what the vertical theory would have to show. It would have to allege that by foreclosing doctor referrals that might have gone to

MultiCare or Swedish, there was an impact on hospital competition. That is the vertical theory. No such claim has been ever made, and Dr. Kessler, other than talking about it as a theoretical matter, he has done a lot of writing in the area, there is no -- he had no quantification of the effect, he had no separation of the vertical from the horizontal.

To the Court's question, we have an economist who could talk about vertical versus horizontal effects. We have not prepared somebody to get into the true vertical effects, which would be at the hospital level, and testify to that.

Frankly, Your Honor, other than alleging that there are vertical effects, I don't believe that the plaintiff's expert has done any analysis like this either, because the vertical effects, again, would be felt in a completely separate market where hospitals compete, maybe where ambulatory surgery centers compete, or in some other products than the two which are at issue here.

Plaintiffs have not claimed, and I didn't hear Mr. Tomisser say, that there are somehow vertical effects on adult PCPs and orthopods that we ought take into account. The effects in those two markets are simple, straightforward theoretical effects which either occurred or didn't occur, that we can try in a routine horizontal case. Adding the vertical overlay confuses things.

MR. TOMISSER: Two quick points, Your Honor. Counsel

reminded me, in fact, vertical price increases were identified in the plaintiff's complaint in this case, that the transaction caused a vertical pricing increase due to referrals having to go through Harrison. I do think the defendant, part of the argument, should we get to the rule of reason, there are vertical efficiencies that have arisen as a result of the transaction. The vertical effects I think are certainly in play in this case.

THE COURT: The Court is going to reserve ruling on this. Again, it is a bench trial. I have the luxury of being able to further ponder on this issue.

With regard to the second issue of the effects that horizontal restraints will have on the future pricing of primary and orthopedic healthcare in the relevant market, it appears to me this may be redundant to Dr. Capps' testimony, and especially so because he apparently relies to some degree upon Dr. Capps' research and findings in connection with this case. By the way, I would say experts routinely rely on the work and opinions of other experts, and that is quite permissible. Here, without ruling, it appears that Dr. Kessler is best reserved for rebuttal even if some of his testimony is not tethered to Dr. Capps' report. Local Rule 43(j) limits a party from calling more than one expert on the same subject unless otherwise permitted by the Court. While that rule is simple in its statement, it is more difficult to

implement because often there are nuanced but real differences in the subject of two experts in the same field who bring slightly different information to their analyses. However, if Dr. Capps is the primary witness in this area, you might want to call him first as to not risk losing his testimony as redundant to Dr. Kessler who might be held as a rebuttal witness. Again, if and when Dr. Kessler or any other expert is believed to be offering a legal conclusion, I anticipate I will hear an objection and I can rule. But the plaintiff has cited to a useful statement when citing to the *Primiano* case which I endorse, and that says, "Economists inform the court's antitrust analysis by identifying and explaining the relevant facts that are observable and by making forecasts, on a more probable than not basis, on what accepted economic research predicts will happen as a result of the challenged agreements."

I have also preliminarily reviewed the motions in limine. There has not yet been a response. They are not due. The motions were filed last Wednesday. Responses are due on March 11th, and a noting date on the Ides of March.

So for the benefit of the parties, I would like to set up a telephone hearing for March 13th at 2:30 to give you direction on these motions rather than wait for that more ominous date of March 15th, and give the parties as much opportunity in advance of their preparation of trial to know

the Court's ruling on those. Don't be surprised if there aren't several rulings deferred until trial. I will try to give you some direction and help on that.

Some housekeeping issues with regard to the trial. The trial day begins at 9:00, completes at 4:30. There is a noon recess for an hour and a half, 12:00 to 1:30. The morning break is -- tends to be around 10:30 for 15 minutes, and again an afternoon break at 3:00 for 15 minutes.

I do expect each party to inform the other on the eve of each trial day the expected witnesses to be called and the expected exhibits to be introduced through each witness.

I would like to see restraint on the number of witnesses and exhibits to be submitted. The pretrial order is voluminous in its listing of witnesses and exhibits.

With regard to the exhibits, I discourage objections based upon authenticity when there really is no doubt about whether the document is what it purports to be. Similarly, objections under 402 or 403 are to be made judiciously. Again, this is a bench trial. The Court does not want the flow of evidence interrupted by a series of objections.

I have a small strike zone on leading questions. By that, what I mean is I won't sustain an objection when the lawyer is simply setting a foundation or is obviously just attempting to move the testimony along. I find that experienced trial lawyers know when a leading question should

be objected to because it truly is just the lawyer testifying.

You will get a better flavor of the Court's strike zone, I guess, as we move through the trial as you test me on these things. I thought I would give you a little heads up that that is sort of how I want to proceed. This is particularly true, again, since this is a bench trial.

I reviewed and entered the order on the use of confidential information at trial. I am hoping and trusting that the protocol will be efficient. I understand the need to close the court will come up -- the need to close the courtroom. I think it would be best, as I think it was suggested, that you do this at the beginning or end of testimony, and seems to me that we should have cross-examination, in other words, interrupt direct examination if we are dealing in an area that needs to be closed, that we proceed with the cross-examination and those discreet issues that are being covered excluding the public.

We won't have a need for the large screen. So lots of this can be accomplished -- I don't think the gallery is going to be able to read your screens. So when we are dealing with particularly sensitive confidential information in a document and careful examination of a witness, so that we don't get into that, I am hoping it can -- we won't need a lot of closing of the courtroom.

Does that make sense?

MR. RAUP: Yes, Your Honor.

THE COURT: I have done a lot of talking. I will ask if there are some questions or further comment here?

MR. ROSS: While the State is talking, if I may, with regard to Phase 1 of the trial, it sounds as though the logical way to proceed would be with respect to the issue the Court has identified we are going to try. Obviously we would introduce witnesses and exhibits to that issue. Opening statements would be directed to that issue. If the Court goes forward with Phase 2, will we have separate opening? That makes sense.

THE COURT: Absolutely.

MR. ROSS: Great deal of different evidence that would come in. It also means that Phase 1 relevance objections may be in order if, for example, the State would try to introduce evidence -- and I am sure they won't -- on what the effect of the arrangement is. That might be challenged as not -- as not relevant because it doesn't go to whether it is a single entity. I could imagine exhibits to which we didn't object in the pretrial might be objectionable -- or testimony might be -- in Phase 1. Just thinking that through. Does that sound logical?

THE COURT: It may come up. The Court will deal with it as it is presented. The Court will know what is relevant

to the issue of single entity and what is not. If I get it wrong, I am not the last -- I don't have the last say in the case.

MR. TOMISSER: Couple points of clarification. Looking at the bifurcation, one of the things the Court still needs to consider, including the per se analysis is part of that because there is a great deal of overlap. We may also have an issue with witness scheduling if the per se rule is not included in the first with Professor Burns.

THE COURT: Will next Wednesday the 13th set for the motions in limine be soon enough for the Court to indicate to you whether we are going to also proceed with per se?

MR. TOMISSER: Yes.

THE COURT: Is that sufficient for your scheduling?

MR. TOMISSER: Yes.

MR. ROSS: Just as a matter of clarification, when they say "per se," you repeated it, I guess I would take much more comfort if the issue were phrased "whether the rule of reason or per se rule would apply in the event that there isn't a single entity." That is my understanding of what the State is proposing and what Your Honor is saying. Is that correct?

MR. TOMISSER: That is correct.

THE COURT: I understand.

Other questions?

MR. MAAS: This is David Maas for The Doctors Clinic. I have a question related to the logistics of the two-phase trial in light of our client's substantial number of potential physician witnesses. We would principally only testify in the second phase if it were to occur. As you can imagine, particularly orthopedic surgeons right now are looking to schedule patients for procedures during what might be a time of trial testimony, if we were to proceed immediately after Phase 1 into Phase 2.

THE COURT: It won't be immediately because we have at least one -- I think only one criminal trial that certainly is going to interfere with it. It is something for us to try and work with Gretchen to look where, assuming Phase 2 is necessary, to work it out. I am thinking it could be as much as a month delay before we take up Phase 2.

MR. MAAS: If I am clear, we finish Phase 1, we have as much as a month before Phase 2 would begin? If our surgeons wanted to schedule for the first week of April right now, that is not likely to be the beginning of Phase 2?

THE COURT: I don't think so. More likely the middle of April is what we are going to shoot for. The Court has a calendar to try to work this in. We don't know exactly when criminal trials are going to go out often until the week before or so. We will try to, and it would be my goal if we proceed to the second phase, that we will be able to have

this case completed in early May.

MR. MAAS: Thank you, Your Honor.

MR. RAUP: Your Honor, one thing that would be helpful to the parties, I think, would be to have revised witness lists and exhibit lists that apply only to Phase 1 so we know what the case is we are expecting to answer.

THE COURT: That is a very good suggestion. That can be accomplished, I take it. That will help the Court and help the parties, too.

All right. If nothing else, we will talk next week on the 13th at 2:30.

(Recessed.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Angela Nicolavo

ANGELA NICOLAVO
COURT REPORTER